UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARISE VIRTUAL SOLUTIONS, INC. **Respondent** **And** **MATTHEW RICE, an Individual** **Charging Party**	**CASE NO. 12-CA-144223**

RESPONDENT ARISE VIRTUAL SOLUTIONS INC.'S AMENDED REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE IN RESPONSE TO THE GENERAL COUNSEL'S ANSWERING BRIEF

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I. INTRODUCTION

Arise established in its opening brief in support of its exceptions to the decision of the Administrative Law Judge (the "Opening Brief") that the Administrative Law Judge ("ALJ") made factual and legal findings in his decision (the "Decision") that resulted in significant error. The General Counsel's (the "GC's") Answering Brief to Arise's Exceptions to the Decision of the Administrative Law Judge and to Arise's Brief in Support of its Exceptions does nothing to address the ALJ's errors.

First, the company Mr. Matthew Rice ("Rice") worked for —Certified Client Solutions LLC ("CCS")—is a necessary party to this action. The ALJ's and GC's attempts to argue otherwise fail. ***Second***, the ALJ erred in ignoring volumes of significant and undisputed evidence related to CCS and in concluding that such evidence was not relevant to his decision regarding the employment status of Rice. As explained in Arise's Opening Brief, this conclusion regarding evidence related to CCS resulted in an incomplete factual picture which lead directly to several analytical errors and, ultimately, an erroneous conclusion that Rice is an employee of Arise. In her brief, the GC failed to provide any substantive response to this argument. ***Third***, the ALJ erred in exceeding his authority and by ruling on the status of any individual other than the Charging Party. This matter involved one charging party and his claim of an unfair labor practice, and the ALJ lacked the authority or jurisdiction to rule on the status of individuals who were not before him and for whom no evidence was presented. Further, even if the ALJ had the power to make a pseudo-class determination (which he did not), it would be the GC's burden to prove that all CSPs are similarly situated—not Arise's burden to prove that they are different. Regardless, nothing in the record establishes that all CSPs are sufficiently similar to justify extrapolating his findings regarding Rice's employment status to all CSPs. The stark contrast between the working experiences of Matthew Rice (a CSP), and Patricia Rice (an owner of a call

center company,[1] but also for a period of time, a CSP), establishes beyond any doubt that there are significant material differences between CSPs. Moreover, the common law agency test for determining whether a worker is an independent contractor requires a highly fact-intensive examination of all incidents of the working relationship. Accordingly, the GC failed to establish that all CSPs are similar with respect to the common law agency factors, and a conclusion regarding one CSP's employment status cannot be extrapolated to all CSPs. ***Fourth***, the ALJ erred in awarding Rice legal expenses and legal fees. The GC failed to rebut Arise's argument that Rice is not entitled to such expenses or legal fees because Arise had a reasonable basis to enforce Rice's class action waiver at the time based on the overwhelming majority of courts that supported enforcement of class action waivers.

II. ARGUMENT

A. Arise Properly Preserved its Objection to the Board's Decision to Deny Arise's Motion to Dismiss for Failure to Include a Necessary Party, and the ALJ Erred in Concluding that CCS Is Not a Necessary Party to this Action

When discussing the ALJ's refusal to grant Arise's motion to dismiss for failure to include a necessary party (the "Motion to Dismiss"), the ALJ notes in the Decision that "[a]t the hearing, the Respondent made no similar motion to dismiss or argument to me that joinder of CCS was necessary before the case proceeded." (Decision at 11.) The GC makes a similar argument. (GC at 4.) This argument is completely meritless, however, because the NLRB Rules and Regulations state that after the case is transferred to the Board, any party may file "exceptions to the administrative law judge's decision or ***to any other part of the record*** or proceeding (including ***rulings upon all motions*** or objections.)" Sec. 102.46 (emphasis added).

[1] The ALJ referred to the call center companies as "IBs" in his Decision, so for the purposes of consistency, Arise will refer to these companies as "IBs" and their owners as Independent Business Owners ("IBOs").

Moreover, because the ALJ had no authority to reverse the Board's prior order denying Arise's Motion to Dismiss, it would have been improper to make the motion again to the ALJ. Rather, the ruling by the Board on Arise's Motion to Dismiss became part of the record in this matter, and it was proper for Arise to raise the argument in its brief to the ALJ to preserve its objection to that ruling, and proper now to except to the ALJ's ruling pursuant to Section 102.46. Accordingly, to the extent the GC argues that Arise's exception to the ruling at this stage is not proper or that Arise should have raised the issue at the hearing, that argument must fail.

The GC's other attempts to argue that CCS is not a necessary party fail. For example, in response to Arise's argument that CCS is a necessary party because it could terminate its Master Services Agreement ("MSA") rather than rescind the Waiver Agreement, the GC states "it is highly unlikely that CCS or any other Independent Business Owner (IBO) would terminate its relationship with Respondent if Respondent directed it to rescind the Waiver Agreement." (GC at 5.)[2] This response is completely speculative and unsupported. Arise's argument is that complete relief cannot be accorded without CCS as a party because CCS could simply terminate its contract with Arise instead of rescinding the Waiver Agreement at issue (to which Arise is **NOT** a party), which would allow CCS, or any other IB, to circumvent the ALJ's ordered relief. The GC's speculation that an IB ***probably*** would not take such action has no evidentiary bearing and does not overcome the issue raised by CCS's absence. Accordingly, the GC failed to adequately respond to Arise's exception that CCS is not a necessary party to this action.

B. The GC Did Not Rebut Arise's Argument That the ALJ Ignored Volumes of Significant and Undisputed Evidence Related to CCS

Arise established in its Opening Brief that the ALJ's fundamental error leading to his ultimately erroneous conclusion was his complete failure to consider the significant and

[2] References to the GC's Answering Brief shall be to "GC" with the page number of the brief.

undisputed evidence regarding CCS, the tripartite relationship between Arise, CCS and Mr. Rice, and CCS's completely independent business functions (which spoke to relevant factors of the common law agency test). Throughout the GC's answering brief, the GC simply concluded that because the ALJ found that evidence related to CCS was not relevant, then such evidence is, *a fortiori*, not relevant.[3] None of those conclusions explain ***why*** the GC (and the ALJ, for that matter) believes such evidence is not relevant to the relationship between Matthew Rice and Arise. (Opening Brief at 16-19, 20-26, 38.) Nothing in the GC's brief adequately responds to Arise's arguments that the ALJ was obligated to consider all circumstances surrounding this working relationship, and that he simply failed to do so. Merely reiterating the point that the evidence is "not relevant" is conclusory, unconvincing, and insufficient. Arise's Opening Brief explains clearly that all incidents of a working relationship must be examined in this relationship—and that includes evidence of the company that Rice worked for. (Opening Brief at 16-19, 20-26, 38.)

C. The GC Did Not Rebut Arise's Argument That The ALJ Erred By Extrapolating His Findings To All CSPs

As an initial matter, in an unfair labor practice proceeding such as this one, neither an ALJ nor the Board has the authority or jurisdiction to rule on the legal status of parties other than the charging party – in other words, neither the Board nor an ALJ can make "class" determinations. In addition, even if the ALJ did have the authority to make such a determination

[3] The GC states: "Although Respondent again attempts to interject CCS's entrepreneurial opportunities into this case, evidence that CCS or other IBOs have entrepreneurial opportunities is not relevant to CSPs' employment status with Respondent. (*See, e.g.*, GC at 9, 17, 19, 20.) As explained further below in Section II.C, this sentence displays the GC's misunderstanding of the overlap between IBOs and CSPs. Because many IBOs, including Patricia Rice, are also CSPs, contrary to the GC's assertions here, evidence that CCS or other IBOs have entrepreneurial opportunities is, in fact, ***extremely*** relevant to whether CSPs (such as Patricia Rice, the IBO of CCS) are employees of Arise. Indeed, those are the precise facts an ALJ would examine to determine whether that individual IBO was an employee of Arise if conducting the examination separately.

(which he did not), it would be the GC's burden to show that all CSPs are similarly situated, not Arise's burden to show that they are different.[4] The record evidence here precludes any such showing by the GC. The Board has consistently held that all facets of a working relationship must be examined to establish if a worker is an independent contractor. *Fedex Home Delivery*, 361 NLRB No. 55 (Sept. 30, 2014) (when evaluating independent-contractor status by an examination of the common-law agency principles, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.") Highlighting this fact-intensive inquiry, Arise established in its Opening Brief that the ALJ erred in assessing the relationship of one CSP and without evidence that he is sufficiently similar to all other CSPs, extrapolating that ruling to all CSPs. Where, as here, the incidents of the working relationship differ greatly depending on a host of different facts (like whether the CSP owns its own company or not), there is simply no logical way to examine one relationship between a CSP and Arise and then extrapolate those results to all other CSPs.

1. Sufficient Evidence in the Record Exists to Establish Material Variation Between CSPs.

To rebut Arise's argument that the findings regarding Matthew Rice cannot be extrapolated to all CSPs, the GC argued that Arise "failed to present specific evidence of factual differences among CSPs with respect to any of the factors analyzed by the ALJ in order to reach his conclusion that CSPs are statutory employees." (GC at 8.) First, there is no obligation for Arise to do so in a matter relating to a single individual—even assuming the Board has the power to make a pseudo-class determination, the burden of establishing sufficient similarity would be

[4] *See, e.g., Vega v. T-Mobile USA, Inc*., 564 F.3d 1256, 1267 (11th Cir. 2009) ("[P]laintiff still bears the burden of establishing every element of Rule 23."). Indeed, district courts regularly deny class certification in independent contractor misclassification cases due to a failure to meet the Rule 23 requirements.

on the GC. Regardless, the record reflects stark differences between two CSPs who have provided services using Arise's platform: Patricia Rice and Matthew Rice.

First, to fully understand the impact of the differences between Patricia Rice and Matthew Rice, it is important to understand that while Patricia Rice was an IBO, she also provided services as a CSP. (Tr.[5] 24:15-18, 145:20-146:1.) At times, the GC (and the ALJ) appears to misunderstand the difference – or lack thereof – between a CSP and an IB or an IBO. For instance, the GC states that "the employment status of IBs[6] is not at issue in this case," or that CSPs do not have an opportunity to bargain over the terms of the agreement because it is presented to the IBOs by Arise. (GC at 20,22.) These statements imply that the GC believes that the question of the employment status of an IBO is always a different question than the employment status of a CSP. This is false. Many times, an IBO is a CSP and a CSP is an IBO, (Tr. 27:13-21), meaning that any ruling on the employment status of a CSP can also be a ruling on the employment status of an IBO. Herein lies the thrust of Arise's argument: there are inherent differences amongst CSPs, chief among them being that some CSPs are also IBOs, which precludes a blanket ruling applied to all CSPs based on the experiences of just one CSP.

Here, the vast differences between Patricia Rice and Matthew Rice as CSPs serve as "evidence of factual differences among CSPs with respect to . . . the factors analyzed by the ALJ." (GC at 8.) For instance:

- Patricia Rice owns and operates her own call center business, which engaged several agents including Matthew Rice, and did so long before partnering with Arise. (*See* Resp. Ex. 16.)[7] Matthew Rice does not.

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[5] Citations to "Tr." refers to the transcript of proceedings conducted on May 2, 2016 and May 3, 2016.

[6] Presumably, the GC is referring to an IBO here since an IB, an "Independent Business," cannot have an employment status as an entity.

[7] Citations to Exhibits introduced by the parties are formatted as follows: (GC Ex. 1); (Resp. Ex.) 1), where "GC" refers to General Counsel for the Board and "Resp." refers to the Respondent.

- Patricia Rice advertised her company, set up a website and a LinkedIn profile touting the success of her call center representatives, provided call center services to other companies, exercised entrepreneurial opportunity, and overall, experienced an opportunity for profit or loss.[8] Matthew Rice experienced less opportunity for profit or loss and exhibited less entrepreneurial opportunity because he worked for Patricia Rice's company.

- Patricia Rice made important business decisions about her company like which projects her workers would be staffed on, how to compensate her workers, how to advertise her company, and what other work or clients to seek out.[9] Matthew Rice had little opportunity to make important business decisions because he did not own his own company —he ***worked for*** another company.

Significantly, these main factual differences between them - *e.g.*, owning and operating a business, having an opportunity for profit or loss as an independent business, maintaining a work force, determining the compensation of that workforce - are the precise facts examined during an inquiry into employment status, and are thus crucial in underscoring both (1) why a ruling as to Matthew Rice based on his factual circumstances could not be extrapolated even to just Patricia Rice, let alone all other CSPs, and (2) why a ruling on Matthew Rice's employment status without considering evidence of CCS was in error, as explained above.[10]

The record reflects sufficient evidence of factual differences between CSPs that render the ALJ's findings inapplicable to any other CSP besides Matthew Rice.

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[8] *See* Tr.127:4-14; 128:21-23, 131:16-18, 146:6-20; 130:3-25, 142:6-12.
[9] *See* Tr. 144:25-145:15, 150:9-151:3, 153:22-154:6, 166:16-17; 209:23-210:7, 261:18-263:2, 270:18-21, 280:15-25.
[10] The findings in the ALJ's Decision also highlight the import of these differences, even just between Patricia and Matthew Rice, and show why the ALJ's decision based on evidence regarding Matthew Rice cannot fairly be extrapolated to all CSPs. For instance, the ALJ stated in his Decision that "CSPs do not operate a business" and that "[t]heir work does not involve risk." (Decision at 18.) He also stated that "CSPs do not have the ability to control important business decisions" or "hire or select employees." (*Id.*) All of these statements are proved untrue with respect to Patricia Rice, as shown directly above.

2. The Relevant Inquiry for the Common Law Agency Test Requires a Highly Factual Analysis and Insufficient Evidence Exists to Establish that CSPs are Similarly Situated With Respect to that Analysis

As established in Arise's Opening Brief, the pertinent legal test for independent contractor status ***requires*** an examination of the realities of a working relationship and individual factual circumstances—circumstances that are simply not identical across all CSPs. (*See* Opening Brief at 11-13.) The evidence the ALJ relied upon to find in favor of employee status was specific to Matthew Rice individually, personally and exclusively. To fairly extrapolate that evidence to all other CSPs, the GC should have presented evidence establishing similarities amongst the CSPs, but she did not. *See Fedex Home Delivery*, 361 NLRB No. 55 (Sept. 30, 2014) (finding that, even in a representation case, "[e]vidence that goes only to employees who are outside of the petitioned-for unit is unlikely to have probative value.") In fact, to support their findings, the ALJ relied on evidence specific to Matthew Rice, such as the following:

- Matthew Rice worked twenty to thirty hours a week "with intermittent work on many of his work days." (Decision at 13.)
- "Matthew Rice had obtained a GED, but did not have any work experience when he became a CSP." (Decision at 15.)
- "Matthew Rice repeatedly was advised on what he needed to do to improve his work . . . ." (Decision at 14.)
- "Matthew Rice testified credibly that he viewed the Respondent - not his mother - as his employer and the people he interacted with from Arise as supervisors." (Decision at 17; *see also* GC at 22.)
- "Matthew Rice performed customer service work for only one of Respondent's clients at a time and did not work for any other employer." (GC at 18.)
- "While Respondent argues that it has other programs available requiring special skills, Matthew Rice testified that the other jobs were for supervisors rather than for CSPs . . . ." (GC at 21.)

These are all facts personal and unique to Matthew Rice and the GC has not shown that any other CSP shares the experiences of Rice. The differences among the CSPs lie in the facts

material to the common law agency test and in the factors analyzed by the ALJ to reach his conclusion. This precludes extrapolating any findings to an entire group of CSPs.

3. Contrary to GC's Assertion, Arise's "Policies and Procedures" Do not Compel the Conclusion that CSPs Are Employees.

In a further effort to rebut Arise's argument that the ALJ should not have applied his findings to all CSPs, the GC points to evidence that Arise maintains the same "policies and procedures for all CSPs". (GC at 2.) To the extent the GC is arguing that the evidence she presented about Arise's policies and procedures that the ALJ relied on established that all CSPs are similarly situated with respect to the common law factors, this argument fails. First, Arise has no policies with respect to CSPs — it only has policies with respect to the IBs with which it contracts. Second, the relevant factors for this test require an examination of the realities of the business relationship—not just a review of Arise's "policies" as to IBs. For example, a central focus of the independent contractor analysis is whether the worker is rendering services as an independent business—no policy or procedure of Arise's dictates how a CSP/IBO runs his or her business, whether and how they seek out other clients, how many employees they choose to hire, or any other decisions that impact whether a company is rendering services as part of an independent business. (Tr. 261:1-262:2.) Accordingly, a review of Arise's "policies and procedures" cannot possibly generate the conclusion that ***all*** CSPs do not render services as an independent business. The same logic applies to almost every factor of the common law test.

The GC did not present "overwhelming evidence that all CSPs are employees of" Arise. (GC at 2). To the contrary, much of the evidence presented was relevant only to Matthew Rice and cannot be representative of other CSPs given the individualized nature of the pertinent facts. Accordingly, the ALJ erred in extrapolating his findings about Matthew Rice to all CSPs.

D. The GC Failed to Rebut Arise's Argument that the ALJ Erred in Awarding Expenses and Legal Fees

The GC argues in her brief that the ALJ "correctly ordered that Respondent is responsible for reimbursing Matthew Rice for all reasonable expenses and legal fees," "consistent with the Board decisions in *Murphy's Oil*[11] and *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983)." (GC at 32.) As established in the Opening Brief, the Board may only award attorneys' fees if an employer violates the Act based on a non-NLRA lawsuit that has a "retaliatory motive" and lacks any "reasonable basis" in the non-NLRA proceeding. *Bill Johnson's*, 361 U.S. at 749; (*see* Opening Brief at 48.) Also established in its Opening Brief is the fact that Arise undoubtedly had a "reasonable basis" to seek to enforce the class action waiver by requesting that Rice withdraw his opt-in consent form from an FLSA collective action. The GC does nothing to rebut Arise's argument that at the time Arise sought to enforce the waiver and arbitration agreement, the overwhelming majority of the courts supported enforcement of arbitration agreements and class action waivers as written, and that two district courts in the Southern District of Florida had previously enforced an almost identical arbitration agreement with a class action waiver in cases against Arise. (*See* Opening Brief at 46.) This dispels any notion that Arise sought to enforce the class action waiver without a "reasonable basis" and that Rice should be entitled to expenses or legal fees.

III. CONCLUSION

The GC has failed to rebut any of the errors identified in Arise's Opening Brief.

Dated: November 4, 2016

Respectfully submitted:

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[11] Notably, the Fifth Circuit declined to enforce the Board's order awarding attorneys' fees in *Murphy Oil*. *See Murphy Oil USA, Inc., v. NLRB*, 808 F. 3d 1013, 1020-21 (5th Cir. 2015).

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CERTIFICATE OF SERVICE

I hereby certify that ARISE VIRTUAL SOLUTIONS INC.'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE in the matter of *Arise Virtual Solutions Inc.* and *Matthew Rice*, Case 12-CA-144223 was duly served electronically upon the following individuals on November 4, 2016:

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